No 20.
from a tutor-dative with whom he was competing for the office.

tutor-dative, and concurreth to the allegeance, That he having the tutory legally established in his person, is not obliged *edere instrumenta*, to any who has not a valid tutory or other interest. It was *answered*, That it is not proper *ante exhibitionem*, to dispute the validity of either of the tutories; and the pursuer, though he were not tutor, but nearest of kin to the children, may have good reason to call for inspection of their writs, wherein they can have no prejudice, but much more, being tutor in law served.

THE LORDS repelled the allegeance *contra exhibitionem*, reserving to the parties to dispute their rights before delivery.

Gilmour, *No* 115. *p.* 85.

1666. *July* 14. FOUNTAIN and BROWN *against* MAXWELL of Nethergate.

No 21.
A person accused of fraud in putting away writs, was found obliged to show *quo modo desiit possidere*.

BROWN, as heir to Mr Richard Brown, who was heir to Thomas Brown, pursued for exhibition and delivery of a wadset right, granted in favours of Thomas; wherein the LORDS having sustained witnesses to be admitted to prove, not only the having of the writs since the intenting of the cause, but the having them before, and the fraudful putting them away, which ordinarily is only probable by writ or oath, unless evidences of fraud be condescended on; in respect the matter was ancient, and the pursuer had long lived in England; now, at the advising of the cause, several of the witnesses were found to depone, that the defender, before the intenting of the cause, not only had such a wadset right, but was dealing to get the same conveyed in his own person, which importing fraud,

THE LORDS would not absolutely decern him to exhibit, but found that he behoved, *docere quomodo desiit possidere*, or otherwise produce, and therefore ordained him to compear that he might be interrogated, and condescend upon the particular writs.

Stair, *v.* 1. *p.* 397.

1667. *December* 5. FOUNTAIN *against* MAXWELL.

No 22.
An intromitter with writs found answerable for them.

ALBEIT the LORDS are tender in exhibition of writs, unless it be proven, that the defenders had the same the time of the intenting of the cause; or had fraudfully put the samen away before, which is *difficilis probationis*; yet, in an exhibition at the instance of ——— Fountain against Maxwell of Nethergate, they decerned to exhibit, albeit it was not proven that the defender had the writs, at, or since the intenting of the cause; in respect it was proven, the defender had meddled with the writs being in a charter chest, and had offered to transact concerning the same, and so was presumed to have put them away fraudulently; there being a great difference betwixt a transient having of

writs, and a downright meddling and intromission; which, being proven, though it be before the intenting of the exhibition, doth oblige the intromitter to be answerable for the same. No 22.

Dirleton, No 114. p. 48.

1678. *January* 31. TAILZIEFER *against* GORDON.

No 23.
A person being pursued for exhibition of writs, it was found that he was not obliged to instruct how he put them away, otherwise than by his own oath; but that he ought to be special, as to whom he delivered them.

PATRICK TAILZIEFER pursues Gordon of Gordonstoun, for exhibition and delivery of certain evidents of lands, whereof Gordonstoun granted receipt to Mr William More, and obliged him to make them forthcoming. And in a competition betwixt Alexander Crawford, for whose children Tailziefer acts, and Gordonstoun, wherein Mr William More was called, Crawford 'was preferred, 'and found to have best right to the lands,' and consequently to all the evidents thereof, and specially to Gordonstoun's bond, to Mr William More. It was *answered*, That albeit in the competition, Crawford was preferred; yet he derives no right from Gordonstoun, or Mr William More; nor can the preference import an assignation to Gordonstoun's obligement, to restore the writs to Mr William More, so that Gordonstoun can only be convened by this exhibition, in common form, 'Referring it to his oath, that he had the writs since 'the citation, or that he had them before, and had put them fraudfully away;' and therefore, as to the having before citation, neither writ nor witnesses are admitted to prove the having, but only the party's oath, because the delivery of writs uses not to be upon written discharges, but parties deliver them *de manu in manum*, without considering whether they have given receipts or not.

THE LORDS found, That the pursuer derived no right from Mr William More to the receipt or obligement produced; and therefore found him not obliged to instruct how he put away these writs, otherwise than by his own oath; but found that he ought to be special therein, to whom he delivered them, and upon what account, unless Mr William More did concur in the exhibition.

Fol. Dic. v. 1. p. 282. Stair, v. 2. p. 606.

1687. *July.* LAIRD of PITREVY *against* THOMSON of Milndeans. No 24.

THE LORDS finding that deponents in exhibitions did sometimes prevaricate in that part of the oath of fraudfully putting away, making themselves judges of the fraud, recommended to the Lords examinators to put the defender in an exhibition to answer as to the way and manner of putting the writs called for away, and whom they gave them to, that the pursuer might find them out, and the Lords judge if there was any fraud used in putting them away before citation. And, in February 1688, an act of sederunt was made.

Harcarse, (EXHIBITION.) *No 485. p. 133.*